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ARKANSAS ATTORNEY GENERAL

Opinion No. 63-23-L  
R-150  
January 23, 1963

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REQUESTED BY: BEN E. STANTON, Chief Right of Way Agent  
Highway Department

OPINION BY: ROBERT W. PICKRELL  
The Attorney General

QUESTION: Where the Highway Department acquires real property for highway purposes, and it becomes necessary to remove certain fixtures and improvements located thereon before it can be devoted to the intended use and the commission determines that the best interest of the public would be served by causing such improvements to be disposed of before they are exposed to looting and vandalism:

- (1) must such property be disposed of through the "Property Condemnation Board" as established in A.R.S. § 41-561? And if not,
- (2) may the Highway Commission authorize and direct that such property be disposed of by its own agent at public auction following ten days' advertisement in local newspapers of general circulation?

ANSWER: (1) No.  
(2) Yes.

The Property Condemnation Board was established by the following language of A.R.S. § 41-561(A).

"A. The governor, secretary of state and state auditor shall constitute a property condemnation board."

The jurisdiction and duties of this board are thereafter set forth in A.R.S. § 41-561(B) (C) and (D) as follows:

"B. The board shall from time to time examine and condemn personal property belonging to the state, or any of its departments or agencies, when such property

becomes worn out or otherwise useless to the state, its departments or agencies. The board shall direct the sale of such property in the manner provided by this article, or the board may, in its discretion, authorize the department or agency which has the property to trade it in on new equipment.

C. After condemnation of property as provided in subsection B of this section, the board may authorize the department or agency in which it is located to advertise it for sale in a newspaper of general circulation published in the state capital once a week for four consecutive weeks, stating therein the time and place of sale. If the sale is made at any place other than the state capital, the advertisement shall also be published in like manner in some newspaper published in the county where the sale is to be made.

D. The property shall be sold at public auction at the time and place advertised to the highest bidder for cash, and the proceeds shall be paid into the state treasury and placed to the credit of the general fund. The necessary expenses of advertisement and sale shall be a charge against the funds so received and deposited."

In 1956 the following portion of the Original Act, of which A.R.S. § 41-561 was a part, was repealed by the legislature.

"The property condemnation board shall, when it appears that real property or improvements thereon belonging to the state, or any of its departments, agencies or institutions, is no longer useful or necessary to the state, its departments, agencies or institutions holding title thereto, examine, appraise and condemn separately such real property or improvements thereon and direct the sale thereof in the same manner as provided by law for sale of real estate by the state land department."

The foregoing repealed portion of the original act, taken together with what remains (A.R.S. § 41-561), draws a clear distinction between personal property on the one hand and real property on the other. Having repealed that portion of the Act

relating to this board's jurisdiction and duties concerning real property belonging to the State and not needed by it, the Property Condemnation Board was divested thereafter of any jurisdiction over the sale or disposition of such real property. Favour v. Frohmiller, (1934), 44 Ariz. 286, 36 P.2d 576; Moran v. Washburn, 19 Conn. Sup. 316, 112 A.2d 897; State v. Becker, (Wash.) 234 P.2d 897.

The inescapable conclusion, therefore, is that real property acquired by the Highway Department and not needed by it need not be disposed of through the board. If, therefore, the improvements and fixtures located and affixed to land acquired by the Highway Department are "real property" as distinguished from "personal property" they may be disposed of by means other than by the provisions of A.R.S. § 41-561.

A provision similar to A.R.S. § 41-561 contained in the City Charter of Phoenix requiring personal property of the city unfit or unnecessary for the city's use to be sold at public auction was held in City of Phoenix v. Linsenmeyer, (1959), 86 Ariz. 328, 346 P.2d 140, not to apply to certain fixtures in the form of sewer and water connections located upon property leased to the city upon termination of the lease term.

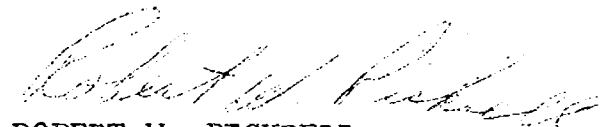
Authority holding that fixtures and improvements permanently affixed to land when they are originally placed, are real property are so numerous and well established that no citation thereof need be made. Moreover, once such property becomes affixed to the land it does not lose its character as real property until it is actually physically severed therefrom. Therefore, so long as such improvements and fixtures are sold or disposed of while they remain affixed to the land, they remain real property and do not come within the jurisdiction of the Property Condemnation Board.

The legislature in A.R.S. § 18-155 provided that:

"C. The commission may dispose of real property or any right, title or interest therein, when it determines that it is no longer needed or used for highway purposes. Rights of way and roadways shall be disposed of or may be used as provided in Title 18, Chapter 5, Article 1." (Emphasis added).

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While there is no specific legislative directive that the Commission shall in disposing of such real property, do so at public auction following advertisement in local newspapers of general circulation, this means is not prohibited. Since this is the usual method provided by the legislature for disposition of public property, the Commission would be well advised to pursue this course.



ROBERT W. PICKRELL  
The Attorney General

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